

Agenda

Item #4



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commissioners

From: Jonathan Wayne, Executive Director
Phyllis Gardiner, Counsel

Date: June 15, 2010

Re: Application by National Organization for Marriage for a Dismissal of
Commission's Investigation

In this memo, the Ethics Commission staff responds to the June 2, 2010 petition by the National Organization for Marriage ("NOM") to dismiss the Commission's investigation of NOM as outside the Commission's scope of legal authority. In this latest application, NOM argues for the first time that the Commission is not statutorily authorized to conduct the investigation into whether NOM is a ballot question committee (BQC).

Commission's Authority to Conduct Investigations

The Commission administers Maine's campaign finance laws (Title 21-A) and lobbyist disclosure laws (Title 3), and has a role in offering advice and hearing complaints regarding the legislative ethics law (Title 1). Its general duties are described in 1 M.R.S.A. § 1008, which is part of the statutes that created the Commission. Among the duties of the Commission, as set forth in Section 1008(2), is the power:

To administer and investigate any violations of the requirements for campaign reports and campaign financing, including the provisions of the Maine Clean Election Act and the Maine Clean Election Fund.

(Emphasis added) (statute attached) In addition to the general duty of the Commission described in 1 M.R.S.A. § 1008, the Election Law (Title 21-A) further describes the duty of the Commission to conduct investigations in campaign finance matters:

The Commission may undertake audits and investigations to determine the facts concerning the registration of a candidate, treasurer, political committee or political action committee, and contributions by or to and expenditures by a person, candidate, treasurer, political committee or political action committee. For this purpose, the commission may subpoena witnesses and records and take evidence under oath.

21-A M.R.S.A. § 1003(1)

Background on Investigation of NOM

The Commission initiated an investigation in response to correspondence received from Fred Karger of Californians Against Hate during August 2009. He requested that the Commission investigate NOM and three other contributors to Stand for Marriage Maine PAC (the coalition PAC formed to promote the November 2009 people's veto referendum on same-sex marriage). Mr. Karger alleged that:

[T]he four funders of Stand for Marriage Maine are merely conduits for those wishing to hide their contributions. These entities are laundering money to evade the disclosure of the actual contributors to Stand for Marriage Maine.

In an August 27, 2009 letter, I invited NOM and Stand for Marriage Maine PAC to respond to Mr. Karger's request. My letter explained that the proposed basis of the investigation was 21-A M.R.S.A. § 1003(1) (quoted above). I noted that Mr. Karger's allegations, if true, could indicate that NOM was required to file campaign finance reports with the Commission as a ballot question committee or as a political action committee.

NOM provided legal argument in a September 21, 2009 letter from its counsel, Barry Bostrom, and in an appearance by Mr. Bostrom at your meeting on October 1, 2009. NOM did not question the legal authority of the Commission under 21-A M.R.S.A. § 1003(1) to investigate whether NOM was a BQC. Rather, NOM argued that no investigation was necessary because NOM did not qualify as a BQC.

On October 1, 2009, the Commission directed the staff to conduct an investigation as to whether NOM was a BQC because of its financial activities to promote the 2009 people's veto referendum. Since that time the Commission staff has requested information and documents, and NOM has raised a number of legal objections to suspend the investigation or limit its scope.

Argument by NOM in favor of Dismissal

In its June 2, 2010 petition, NOM argues that the authority of the Commission to conduct investigations should be narrowly construed because investigations into campaign finance activities tend to impinge on freedom of speak on political matters. NOM contends that the Commission's power to investigate under 21-A M.R.S.A. § 1003(1) extends only to "a candidate, treasurer, political committee, or political action committee." Because BQCs are not specifically included in this list, NOM argues that the Commission may not investigate whether an organization is required to register and file reports as a BQC.

Response by Commission Staff

Persons and Organizations Regulated by Maine Campaign Finance Law

Filers (of registrations and campaign finance reports)

Under Maine's campaign finance law, the Commission receives registrations and/or financial reports of contributions and expenditures from four types of entities:

- (1) candidates
- (2) the state and local committees of the political parties ("party committees"),
- (3) political action committees (PACs), and
- (4) ballot question committees (BQCs).

In addition, organizations spending money on certain communications to voters must file independent expenditure reports, and some of them (*e.g.*, labor unions or other associations) do not otherwise file registrations and campaign finance reports.

Collectively, the Commission staff informally refers to these persons and organizations as "filers" because they are required to submit registrations and campaign finance reports to the Commission.

Other persons and organizations regulated by campaign finance law

Maine's campaign finance law regulates other persons and organizations as well:

- The Commission administers the "paid for" disclosure statement that must be included *within* communications to voters (*e.g.*, advertising or mailers) that expressly advocate for the election or defeat of a candidate. (21-A M.R.S.A. § 1014).
- The Commission also administers the \$350 and \$750 contribution limit that applies to contributors to candidates for state office, including the ability to assess penalties against contributors who exceed this limit. (21-A M.R.S.A. §§ 1004-A and 1015)

- Political campaigns often involve individuals who have roles other than candidate or treasurer. Campaigns for elective office (particularly larger campaigns for the offices of Governor or State Senate) sometimes have campaign managers, consultants, deputy treasurers, or other agents working for a candidate. The Commission is authorized to penalize these individuals for certain legal violations, such as mispending Maine Clean Election Act funds or submitting documents to the Commission containing material false statements. (21-A M.R.S.A. § 1004-A(5)) and 1127(1))

Commission's Power to Investigate

As stated in the “general duties” section of the Commission’s enabling statute (1 M.R.S.A. § 1008(1)), the authority of the Commission to conduct investigations extends to “any violations of the requirements for campaign reports and campaign financing, including the provisions of the Maine Clean Election Act” (emphasis added). Its investigative power is not limited by this language to investigating only certain types of entities or certain types of reports. It extends to all persons and organizations that are regulated by Maine’s campaign finance law. If the Commission’s investigative power were as restricted as NOM suggests, the Commission would be prevented from investigating serious violations of campaign finance law not listed in 21-A M.R.S.A. § 1003(1), including misuse of public funds or serious reporting violations.

Section 1003 of Title 21-A expressly authorizes the Commission to conduct “investigations to determine the facts concerning”:

- the registration of a candidate, treasurer, political committee or PAC;
- contributions by a person, candidate, treasurer, political committee or PAC; and
- expenditures by a person, candidate, treasurer, political committee or PAC.

BQCs and party committees are not specifically mentioned by name in Section 1003(1), but they are encompassed in the broader definition of the term “political

committee” used in that subsection. “Political committee” means “two or more persons associated for the purpose of promoting or defeating a candidate, party or principle” and thus includes BQCs, party committees, and some organizations that must file independent expenditure reports. (21-A M.R.S.A. § 1(30), attached) Moreover, the reference to contributions to and expenditures by a “person” -- broadly defined in 21-A M.R.S.A. § 1001(3) to include “an individual, committee, firm, partnership, corporation, association or organization” -- encompasses any individual or organization spending money in a manner that might constitute a “contribution” or “expenditure” under the statute. Finally, it should be noted that BQCs and party committees are specifically referenced – along with candidate committees and political action committees – and in lieu of “political committees” -- in the definition of “investigative working papers” made confidential by this statute. (21-A M.R.S.A. § 1003(3-A)) The Legislature used these specific designations in subsection 3-A in lieu of the more general reference to a “political committee” in subsection 1.

Section 1003 of Title 21-A, when read in its entirety and in conjunction with the Commission’s general duties in 1 M.R.S.A. § 1008, thus clearly authorizes an investigation into whether the raising or spending of funds on a ballot question campaign by a particular entity such as NOM means that it must register and file as a BQC.¹

The legislative history of Maine’s campaign finance laws supports this reading. When the campaign finance and election laws were recodified in 1985, 21-A M.R.S.A. § 1003(1) authorized the Commission to investigate “to determine the facts concerning the

¹ This reading is consistent with accepted rules of statutory construction. *See Town of Eagle Lake v. Comm’r, Dep’t of Educ.*, 2003 ME 37, ¶ 7, 818 A.2d 1034, 1037 (court must consider whole statutory scheme for which the section at issue forms a part to achieve harmonious result as Legislature presumably intended).

registration of any political action committee and contributions by or to and expenditures by any person, candidate or political action committee.” (P.L. 1985, c. 161, §6.) This provision was broadened in 1989 to authorize investigations “to determine the facts concerning the registration of any candidate, political committee or political action committee.” (P.L. 1989, c. 504, §1 (adding the underlined words)) The requirement for candidate committees and party committees to register was established at the same time. (P.L. 1989, c. 504) At that time, the filing status of BQC had not been created, however, and entities that are now defined as BQCs were included in the definition of political action committee.²

In 2000, the Maine Legislature created a separate filing status for BQCs and later amended the BQC reporting statute in 2008.³ In these instances, the Legislature made no changes to 21-A M.R.S.A. § 1003(1), presumably because the definition of “political committee” was broad enough to encompass them.

When subsection 3-A was added to 21-A M.R.S.A. § 1003 in 2008, making “investigative working papers” of the Commission confidential, BQCs and party committees were specifically referenced instead of “political committees.” *See* P.L. 2007, c. 571, § 6 (eff. Apr. 7, 2008). There is nothing inconsistent or indicative of a legislative intent to exclude BQCs from the scope of the Commission’s authority to investigate.

Thus, when 21-A M.R.S.A. § 1003(1) is read in its entirety (including the reference to BQCs in subsection 3-A) and in conjunction with the direction in 1 M.R.S.A.

² *See* 21-A M.R.S.A. § 1052(5)(A)(3), as amended by P.L. 1989, c. 504, § 23 (defining PAC to include “[a]ny person who makes expenditures other than by contribution to a political action committee, for the purpose of the initiation, promotion or defeat of any question.”)

³ P.L. 1999, c. 739, § 8 (enacting 21-A M.R.S. § 1056-B) and P.L. 2007, c. 477, § 4.

§ 1008 to investigate “any” campaign finance violation, it clearly authorizes an investigation into whether a particular entity must register and file as a BQC.

Recommendation

For the foregoing reasons, the staff recommends that the Commission deny NOM’s Petition for Dismissal of Investigation.

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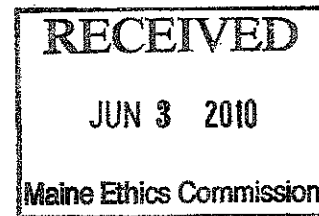
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June 2, 2010



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PETITION FOR DISMISSAL OF INVESTIGATION

Dear Mr. Wayne:

By and through counsel, Petitioner the National Organization for Marriage ("NOM"), files this petition to dismiss the investigation by the Commission on Governmental Ethics (the "Commission") as beyond the scope of power allowed or granted it by Maine law.

On October 1, 2009, the Commission voted to begin an investigation into whether NOM had violated 21-A M.R.S.A. §1056-B by failing to register as a ballot question committee ("BQC"). See Letter from Jonathan Wayne, Executive Director, State of Maine Commission on Governmental Ethics and Election Practices, to Barry A. Bostrom, Counsel for NOM (Oct. 2, 2009) ("Investigation Letter") (confirming that the Commission had decided at its October 1 meeting "to conduct an investigation regarding whether the activities of [NOM] . . . violated 21-A M.R.S.A. § 1056-B.")

Title 21-A, § 1056-B of the Maine Statutes provides, in relevant part, that:

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Any person not defined as a political action committee who solicits and receives contributions or makes expenditures, other than by contribution to a political action committee, aggregating in excess of \$5,000 for the purpose of initiating, promoting, defeating or influencing in any way a ballot question must file reports with the commission in accordance with this section. Within 7 days of receiving contributions or making expenditures that exceed \$5,000, the person shall register with the commission as a ballot question committee. (emphasis added).

The only possible “violat[ion of] . . . § 1056-B,” Investigation Letter at 1, would be that NOM should have registered (and reported) as a BQC. No other regulation of a BQC is authorized by § 1056-B. However, the Commission’s authority to investigate “the facts concerning the registration” of an entity does not include investigations concerning the registration of a BQC. The current investigation is therefore beyond the power granted by Maine law.

21-A M.R.S.A. § 1003(1), the statute granting the Commission’s investigatory powers, provides that the “commission may undertake audits and investigations to determine the registration of a candidate, treasurer¹, political committee² or political action committee³ and contributions by or to and expenditures by a person, candidate, treasurer, political committee or political action committee.” A BQC is, by definition, not one of the entities for which the statute grants the authority to investigate. *See supra*, n.3.⁴ The investigation of NOM does not involve the registration of a candidate, treasurer, political committee or political action committee, but the registration of a BQC. In short, the grant of authority to investigate the failure to register extends only to the failure to register as a candidate, treasurer, political committee, or political action committee, not as a BQC. Hence, under the plain meaning of the statute authorizing the

¹For purposes of Title 21-A, a treasurer is defined as a “person appointed by a candidate or a political committee to accept or disburse money to promote or defeat a candidate, party or principle.” M.R.S.A. 21-A § 1(45).

²For purposes of Title 21-A, a political committee is defined as “2 or more persons associated for the purpose of promoting or defeating a candidate, party or principle.” M.R.S.A. 21-A § 1(30).

³A BQC is explicitly defined in contradistinction to a political action committee. *See* M.R.S.A. 21-A § 1056-B (“Any person not defined as a political action committee . . .”).

⁴Related provisions specifically acknowledge BQCs, bolstering the view that excluding BQCs from the first clause is intentional. *See* § 1003(3-A) (including “[i]nformation belonging to a . . . ballot question committee” in its list of “investigative working papers” subject to the statute’s treatment of “Confidential records”).

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Commission's investigations, the Commission has no authority to investigate NOM concerning registration as a BQC, the question pursued by the Commission here.

And while the enabling statute might, in other circumstances, be liberally construed, where, as here, "the subject matter which the [Commission] oversees . . . relates to the behavior of individuals and groups only insofar as they act, speak and associate for political purposes," the question of "investigative authority warrants extra-careful scrutiny." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981).

The "subject matter of [the] materials [sought] represents the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association." *Id.* at 388. "This information is of a fundamentally different constitutional character . . . since release of such information to the government carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment." *Id.* (footnote omitted). "The [United States] Supreme Court has warned that '[i]t is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas . . .'" *Id.* at 389 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (emphasis added)). In circumstances such as this, where the Commission's investigations operate to chill core First Amendment activities, its authority to conduct them must be clear, and here, it is at best doubtful.

Conclusion

The plain language of the statute granting the Commission authority to conduct investigations does not authorize investigations concerning the registration of an entity as a BQC, and where, as here, such investigations can operate to chill the exercise of core First Amendment rights, the statutory authority enabling them must be clear. Because the Commission is statutorily not authorized to conduct the present investigation, and its conduct by definition and in fact chills the free exercise of political speech and association guarded by the first amendment, the investigation should be dismissed.

Sincerely,

BOPP, COLESON & BOSTROM



Barry A. Bostrom

21-A MRSA § 1003. INVESTIGATIONS BY COMMISSION

1. Investigations. The commission may undertake audits and investigations to determine the facts concerning the registration of a candidate, treasurer, political committee or political action committee and contributions by or to and expenditures by a person, candidate, treasurer, political committee or political action committee. For this purpose, the commission may subpoena witnesses and records and take evidence under oath. A person or political action committee that fails to obey the lawful subpoena of the commission or to testify before it under oath must be punished by the Superior Court for contempt upon application by the Attorney General on behalf of the commission.

[2005, c. 301, §5 (AMD) .]

2. Investigations requested. A person may apply in writing to the commission requesting an investigation concerning the registration of a candidate, treasurer, political committee or political action committee and contributions by or to and expenditures by a person, candidate, treasurer, political committee or political action committee. The commission shall review the application and shall make the investigation if the reasons stated for the request show sufficient grounds for believing that a violation may have occurred.

[1991, c. 839, §1 (AMD); 1991, c. 839, §34 (AFF) .]

2-A. Confidentiality.

[2001, c. 535, §1 (RP) .]

3. State Auditor. The State Auditor shall assist the commission in making investigations and in other phases of the commission's duties under this chapter, as requested by the commission, and has all necessary powers to carry out these responsibilities.

[1999, c. 426, §31 (AMD) .]

3-A. Confidential records. Investigative working papers of the commission are confidential and may not be disclosed to any person except the members and staff of the commission, the subject of the audit or investigation, other entities as necessary for the conduct of an audit or investigation and law enforcement and other agencies for purposes of reporting, investigating or prosecuting a criminal or civil violation. For purposes of this subsection, "investigative working papers" means documents, records and other printed or electronic information in the following limited categories that are acquired, prepared or maintained by the commission during the conduct of an investigation or audit:

A. Financial information not normally available to the public; [2007, c. 571, §6 (NEW) .]

B. Information belonging to a party committee, political action committee, ballot question committee, candidate or candidate's authorized committee that, if disclosed, would reveal sensitive political or campaign information; [2007, c. 571, §6 (NEW) .]

C. Information or records subject to a privilege against discovery or use as evidence; and [2007, c. 571, §6 (NEW) .]

D. Intra-agency or interagency communications related to an audit or investigation. [2007, c. 571, §6 (NEW) .]

The commission may disclose investigative working papers, except for the information or records

subject to a privilege against discovery or use as evidence, in a final audit or investigation report or determination if the information or record is materially relevant to a finding of fact or violation.

[2007, c. 571, §6 (NEW) .]

4. Attorney General. Upon the request of the commission, the Attorney General shall aid in any investigation, provide advice, examine any witnesses before the commission or otherwise assist the commission in the performance of its duties. The commission shall refer any apparent violations of this chapter to the Attorney General for prosecution.

[2001, c. 470, §5 (AMD) .]

SECTION HISTORY

1985, c. 161, §6 (NEW). 1989, c. 504, §§1,31 (AMD). 1991, c. 839, §1 (AMD). 1991, c. 839, §34 (AFF). 1999, c. 426, §31 (AMD). 2001, c. 237, §1 (AMD). 2001, c. 470, §5 (AMD). 2001, c. 535, §1 (AMD). 2005, c. 301, §5 (AMD). 2007, c. 571, §6 (AMD).

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1 MRSA §1008. GENERAL DUTIES

The general duties of the commission shall be: [1975, c. 621, §1 (NEW) .]

1. Legislative ethics. To investigate and make advisory recommendations to the appropriate body of any apparent violations of legislative ethics;

[2007, c. 642, §3 (AMD) .]

 **2. Election practices.** To administer and investigate any violations of the requirements for campaign reports and campaign financing, including the provisions of the Maine Clean Election Act and the Maine Clean Election Fund;

[2001, c. 430, §4 (AMD) .]

3. Ethics seminar. To conduct, in conjunction with the Attorney General and the Chair of the Legislative Council or their designees, an ethics seminar for Legislators after the general election and before the convening of the Legislature, in every even-numbered year. The Attorney General shall provide each Legislator with a bound compilation of the laws of this State pertaining to legislative ethics and conduct;

[1995, c. 1, §4 (AMD) .]

4. Lobbyist activities. To administer the lobbyist disclosure laws, Title 3, chapter 15;

[1995, c. 1, §5 (AMD) .]

5. Maine Clean Election Act and Maine Clean Election Fund. To administer and ensure the effective implementation of the Maine Clean Election Act and the Maine Clean Election Fund according to Title 21-A, chapter 14; and

[1995, c. 1, §6 (NEW) .]

6. Enhanced monitoring. To provide for enhanced monitoring and enforcement of election practices and the electronic submission of reports and computerized tracking of campaign, election and lobbying information under the commission's jurisdiction.

[2005, c. 301, §1 (AMD) .]

SECTION HISTORY

1975, c. 621, §1 (NEW). 1977, c. 337, §1 (AMD). 1989, c. 561, §§2,3 (AMD). 1993, c. 691, §§1-3 (AMD). IB 1995, c. 1, §§3-6 (AMD). 2001, c. 430, §4 (AMD). 2003, c. 20, §J1 (AMD). 2005, c. 301, §1 (AMD). 2007, c. 642, §3 (AMD).

27-B. Overseas voter. "Overseas voter" means:

A. A person who resides outside the United States and who was qualified to vote in the last place in which the person was domiciled in the State before leaving the United States; or [2003, c. 407, §3 (NEW) .]

B. A person who resides outside the United States and, except for such residence, would be qualified to vote in the last place in which the person was domiciled in the State before leaving the United States. [2003, c. 407, §3 (NEW) .]


[2003, c. 407, §3 (NEW) .]

28. Party. "Party" means a political organization which has qualified to participate in a primary or general election under chapter 5.

[1985, c. 161, §6 (NEW) .]

29. Peace officer. "Peace officer" means state police officer, local police officer, sheriff, deputy sheriff or constable.

[1985, c. 161, §6 (NEW) .]

 **30. Political committee.** "Political committee" means 2 or more persons associated for the purpose of promoting or defeating a candidate, party or principle.

[1985, c. 161, §6 (NEW) .]

30-A. Pollwatcher. "Pollwatcher" means a party worker who remains in the voting place outside the guardrail enclosure for the purpose of viewing the voting process, keeping track of the voters who have voted or challenging voters whose qualifications appear to be in question.

[2001, c. 310, §2 (NEW) .]

31. Population. "Population" means the population determined by the last Decennial Census of the United States.

[1985, c. 161, §6 (NEW) .]

32. Primary election. "Primary election" means the regular election for the election of nominees of a party for the general election.

[1987, c. 423, §1 (AMD) .]

33. Protective counter.

[2009, c. 253, §3 (RP) .]

33-A. Public counter. "Public counter" means a separate counter built into a voting device that records the total number of ballots cast or tabulated on the voting device for an election.

[2009, c. 253, §4 (NEW) .]

34. Public official. "Public official" means a person elected or appointed to serve the people.

[1985, c. 161, §6 (NEW) .]